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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

EVAN L. OLSON et al., **Plaintiffs and Appellants,** **v.** **SIX RIVERS NATIONAL BANK,** **Defendant and Respondent.**	**A100172** **(Humboldt County Super. Ct. No. DR990367)**

Evan and Barbara Olson (the Olsons) appeal from a judgment entered after the trial court adjudicated three causes of action against them in a bench trial and granted respondent Six Rivers National Bank (Six Rivers) summary judgment on the remaining two causes of action. The Olsons alleged that a customer of Six Rivers had fraudulently induced them to take out a loan from Six Rivers for the purpose of investing in the customer's company, which subsequently declared bankruptcy. They now contend the trial court erred by: (1) concluding the loan transaction was not subject to the California securities laws (e.g., Corp. Code, § 25401); (2) declining to rescind the transaction based on theories of concealment and failure of consideration; and (3) granting summary judgment on causes of action under the California Consumer Credit Reporting Agencies Act (Civ. Code, §§ 1785.1-1785.36).

We will affirm the judgment. In the published portion of this opinion, we consider whether Six Rivers violated the California Consumer Credit Reporting Agencies Act by requesting credit information pertaining to Evan Olson (Evan) in connection with a loan

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts IIA and B.

to be made to Barbara Olson (Barbara). We conclude the bank's request was permissible under subdivisions (a)(3)(A) and (F) of Civil Code section 1785.11.

I. FACTS AND PROCEDURAL HISTORY

The Olsons sued Six Rivers for tort damages, declaratory relief, rescission, and violation of the California Consumer Credit Reporting Agencies Act (Credit Reporting Act). The trial court denied Six Rivers' motion to compel arbitration, yet stayed arbitration pending the outcome of the litigation. In an earlier appeal (appeal No. A088242), we affirmed the stay of arbitration and reversed in part the denial of the motion to compel arbitration. In particular, we held the tort damage claims were subject to the arbitration clause, while the equitable claims for rescission and declaratory relief, and the claims under the Credit Reporting Act, were not.

Upon remand, Six Rivers moved to bifurcate the equitable causes of action from the causes of action under the Credit Reporting Act. The court granted the motion and ordered the equitable causes of action tried first.

A. BENCH TRIAL ON EQUITABLE CAUSES OF ACTION

The Olsons sought a judicial declaration that their loans from Six Rivers were illegal, particularly under the California securities laws.[1] They also sought rescission on the grounds of intentional misrepresentation, concealment, negligent misrepresentation, and failure of consideration. The evidence at trial included the following.

In 1994, Six Rivers made a $100,000 SBA (Small Business Administration)-guaranteed start-up loan to Information Management Consultants (IMC), a medical transcribing business. Six Rivers loaned IMC an additional $60,000 in September 1995. In regard to these loans, Six Rivers dealt primarily with IMC partner Barbara Oliver (Oliver), who also had a personal account at the bank.

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[1] Another declaratory relief claim, filed as the thirteenth cause of action in their third amended complaint, alleged that the loan transactions were in fact guarantee transactions. The trial court also rejected this claim. The Olsons do not challenge that decision.

Oliver began dating Evan's cousin, and befriended the Olsons in January 1996.[2] Oliver discussed IMC with Barbara for some time, indicating that IMC was successful and was working on obtaining a "million-dollar contract" with Amador Hospital. In addition, Oliver stated, when IMC obtained the hospital contract it would hire Barbara as its executive director at a salary of $55,000 per year. The proposed salary at IMC was about $20,000 more than Barbara's salary as a postal window clerk.[3] Oliver did not tell Barbara that IMC was losing money and had outstanding loans from Six Rivers.

In March 1996, Six Rivers loaned IMC another $20,000. The following month, Oliver met with Six Rivers to obtain yet more funding. As memorialized in the notes of Six Rivers' junior loan officer Kelli Denney (Denney), Oliver provided financial projections indicating IMC would become profitable if it obtained at least one contract generating $15,000 more income. As of April 11, 1996, IMC's account at Six Rivers was overdrawn by $17,042.21, and Oliver's personal account was overdrawn by $5,018.54.

On April 12, 1996, Six Rivers loaned IMC approximately $55,000 as additional working capital. That same date, Six Rivers gave Oliver a $70,000 home equity loan, based on a house appraisal showing a value of $340,000. Oliver did not tell Six Rivers the house had never been built, however, and by the time Six Rivers discovered this problem through a title inspection, the funds had already been disbursed. Six Rivers later sold its interest in the property at a loss.

Oliver again met with Denney at Six Rivers on June 4, 1996, maintaining that IMC needed yet more money. IMC's financial reports showed total accounts payable of $98,335.45, $42,651.68 of which pertained to accounts older than 90 days. IMC had lost over $18,000 in April 1996 and over $19,000 in May 1996, and Denney did not believe

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[2] Oliver subsequently married Evan's cousin and is sometimes referred to in the record as Barbara Mitchell.

[3] Barbara testified: "[Oliver] told me that [IMC] was a very successful business, that she was in the process of procuring a contract with a hospital, I believe the name was Amador Hospital, and this was going to be a million dollar contract." "[T]hen once she secured this contract I could come on board, I could begin working once the contract was secured."

IMC would improve financially. Nevertheless, based on Oliver's credit and repayment ability (and notwithstanding the incident with the "house" appraisal), Six Rivers extended a loan to Oliver, and Oliver signed the proceeds over to IMC. As of June 11, 1996, IMC's account at Six Rivers was overdrawn by more than $8,000.

On June 14, 1996, Oliver telephoned Barbara. Oliver asked Barbara to take out a loan at Six Rivers on behalf of IMC, explaining that IMC could not borrow money at the time and might close temporarily without an immediate cash infusion. According to Barbara, Oliver told her that Oliver—not Barbara—would be responsible for the loan payments.

While Barbara contends that Oliver first mentioned the loan idea on June 14 and rushed her into it that day, there was evidence Barbara had participated in Oliver's pursuit of the loan 10 days earlier. Six Rivers apparently received Barbara's personal financial statement, dated June 4, 1996, on a Six Rivers' form, on June 4, 1996. (Six Rivers obtained the Olsons' credit report on that date, and the Olsons' financial statement was the only source of the social security numbers required to order the report.) The evidence at trial suggested Oliver wrote much of the financial statement, but Barbara had signed it.

At any rate, on June 14, 1996, Six Rivers' senior lender, Gene Ulrich (Ulrich), instructed junior lender Tammy Brown (Brown) to prepare documents enabling Barbara to borrow $25,000. Denney was on vacation at the time. That same day, Barbara and Oliver met with Brown and Six Rivers' senior loan officer Susan Diehl-McCarthy (McCarthy), at the bank. Barbara was introduced as someone who was "going to come to work for IMC." She did not disclose her purported understanding that she would not be responsible for repaying the loan.

McCarthy had asked Brown to attend the meeting to make sure Barbara understood what she was doing and the risk she was taking by using the loan proceeds to invest in IMC. Meanwhile, McCarthy personally informed Barbara that IMC had a lot of potential. No one from Six Rivers told Barbara the specifics of IMC's financial condition, such as how much money it was losing, how much it owed the bank, or how

much its account was overdrawn. Nor was it disclosed that some of the funds Barbara was to deposit into IMC's account would be used to make payments on Six Rivers' loans to IMC and cover IMC's overdrafts, or that all of IMC's assets were pledged to Six Rivers as collateral. According to Brown, Barbara was told IMC "was a young company that was struggling, and without this capital infusion, it was going to close its doors . . . ." In addition, McCarthy asked Barbara if Oliver had told her everything about the business; Barbara, thinking she meant what services the business provided, rather than its financial condition, responded in the affirmative.[4]

Barbara executed a promissory note to Six Rivers for $25,000, to be repaid in two months. In return, she received a $25,000 cashier's check that same day, without any restriction on her use of the funds. With Brown's assistance, Barbara endorsed the check for deposit into IMC's account. Her purpose for borrowing the funds, she testified, was to sustain IMC financially so IMC could give her a job.

Brown thereafter prepared a file memorandum, memorializing the transaction. As the Olsons note, in part the memorandum stated: "This loan request for $25,000 was made to Barbara Olson personally for the purpose of investing into the Information Management Consultant company." But the Olsons ignore another portion of the memorandum, which stated: "At the time of loan document signing, present were Barbara Olson, Barbara Oliver, Susan Diehl McCarthy and myself, Tammy Brown. *We had a discussion about IMC in which Susan made very clear to Barbara Olson the weak financial condition of the IMC company. Ms. Olson reiterated that she understood the financial status of the company and was very aware that her investment was at risk, but it was a risk that she was wanting to take*." (Italics added.)

Upon her return from vacation, Denney signed the loan documents on Six Rivers' behalf. Of the $25,000 Barbara deposited into the IMC account, over $7,000 was used to

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4 McCarthy further testified at trial that she informed Barbara that the funds could be used by IMC for any purpose, IMC was "in trouble," and "it would be solely her decision to invest money in that company." But in her deposition, McCarthy had been unable to recall any such discussions.

pay down IMC's or Oliver's outstanding indebtedness to the bank. Oliver transferred $15,000 to her personal account. The Olsons did not retain any of the proceeds.

On September 26, 1996, IMC filed a voluntary bankruptcy petition, listing assets of $21,000 and liabilities of $339,111.83. The next month, Oliver initiated a $35,000 loan from Six Rivers to the Olsons, for $10,000 plus $25,000 to pay off the June 14 loan. According to Barbara, Six Rivers' senior lender, Ulrich, told her IMC had the potential to be a million dollar business and it was so easy to run the business even he could do it. Based on this comment, Evan believed IMC was a good business as well. He was not told of IMC's monthly losses or overdue accounts payable.

Six Rivers sold the IMC assets in November 1996, advising the purchaser of IMC's overdrafts and the fact that all of IMC's assets were collateral for Six Rivers loans. In July 1998, Oliver filed her own bankruptcy petition. Her former business partner asserted at trial that she was habitually dishonest and untruthful.

Banking expert Wayne Shaffer opined that Six Rivers' actions in connection with the June 14 loan did not meet industry standards. In 20 years as a lending officer, Shaffer testified, he had never approved a loan like the June 14 loan to Barbara. Also, according to Shaffer, Six Rivers had a conflict of interest in the transaction, violated its own lending policies and standards, improperly used Oliver as an intermediary by allowing her to complete Barbara's loan application documents and deliver them to the bank, and represented to Barbara that IMC had a lot of potential, even though its financial condition made it extremely unlikely IMC would survive. Shaffer further offered that Six Rivers assumed the role of investment advisor to Barbara, with a duty of full disclosure, yet failed to adequately disclose IMC's financial condition.

The court issued a memorandum of tentative decision rejecting the Olsons' claims, and the Olsons requested a formal statement of decision. The court entered its statement of decision on December 27, 2001.

B. SUMMARY JUDGMENT ON CLAIMS UNDER THE CONSUMER CREDIT REPORTING ACT

After prevailing at the bench trial, Six Rivers filed a motion for summary judgment as to the Olsons' remaining two causes of action under the Credit Reporting Act. As discussed further *post*, the motion was granted. Judgment was entered, and this appeal followed.

II. DISCUSSION

As mentioned, the Olsons contend the June 14 promissory note was an illegal contract, the note should have been rescinded, and summary judgment should not have been granted as to their claims under the Credit Reporting Act. They fail to establish reversible error.

A. ILLEGAL CONTRACT (SEVENTH CAUSE OF ACTION; CALIFORNIA SECURITIES LAWS)

In their seventh cause of action, the Olsons sought a judicial declaration that the June 14 promissory note reflected an "illegal contract" and was thus unenforceable. In particular, the Olsons contended the debt to the bank was "in violation of applicable state and federal banking and state security laws and regulations."

Rejecting the Olsons' claim, the trial court ruled: "The facts of this case are that first Mrs. Olson and then both plaintiffs entered into what on its face appears to be a series of regular loan transactions with the defendant. The plaintiffs received the loan proceeds and according to the testimony at trial were free to put them to a use of their choosing. Plaintiffs have offered no persuasive evidence that this routinely appearing transaction violated any identified 'state and federal banking' law or regulation. [¶] Ultimately, the plaintiffs claim that the transaction violated 'security laws.' While it is true that a security can be a 'note' or an 'evidence of indebtedness' [Corporations Code, § 25019], the transaction being litigated clearly did not involve the sale of a note or evidence of indebtedness; it was the creation of an indebtedness in the form of a note given by the plaintiffs to the defendant." For reasons we next explain, we find no error in the court's decision.

Corporations Code section 25401 makes it is unlawful to "offer or sell a security . . . by means of any written or oral communication which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statement made, in the light of the circumstances under which they were made, not misleading." Under California Corporations Code section 25019, a "security" includes a "note" or "investment contract," whether evidenced by a written document or not. The Olsons contend that Corporations Code section 25401 applies to the matter before us, because Six Rivers knew Barbara was going to use the loan proceeds to make an "investment" in IMC. They further contend that Six Rivers violated Corporations Code section 25401, because McCarthy represented that IMC had a lot of potential and failed to disclose IMC's dire financial circumstances.[5]

Substantial evidence supports the court's conclusion that Six Rivers did not offer or sell a security within the meaning of the California securities laws. The transaction between Six Rivers and Barbara was simply a loan from Six Rivers to Barbara: Six Rivers disbursed $25,000 to Barbara, in exchange for her promise to repay the amount on certain terms and conditions. Although the promissory note might itself constitute a security, Six Rivers never offered to *sell* the note: it was merely created.

The Olsons argue, however, that it was Barbara's *investment in IMC* which constituted the security, and that Six Rivers should be liable under the securities laws because (1) the Six Rivers' loan was an inseparable part of her IMC investment (such that the bank would be liable under Corporations Code section 25401) or (2) Six Rivers knowingly provided substantial assistance to Oliver in her fraudulent procurement of the

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[5] The Olsons also argue application of Corporations Code section 25403, subdivision (b), which provides that "[a]ny person that knowingly provides substantial assistance to another person in violation of any provision of this division . . ." is deemed to be in violation to the same extent of the person who the assistance was provided. Oliver represented to Barbara that IMC was highly successful, IMC was going to get the Amador Hospital contract, Barbara would be given a job, and Barbara would not be responsible for the loan. The Olsons contend Six Rivers knowingly assisted Oliver in violating Corporations Code section 25401 by making the loan to Barbara for the purpose of investing in IMC.

investment (such that the bank would be liable under Corporations Code section 25403). The Olsons point out: even though the arrangement as to Barbara's investment in IMC was oral, a security within the meaning of Corporations Code section 25019 can arise from an oral transaction.

As a threshold matter, we are not convinced that Barbara's deposit of funds into IMC's account evidenced a security within the meaning of the California securities laws. Her deposit was motivated by the hope that she would become employed by IMC if the company's financial condition was propped up. In return for her deposit, Barbara received no stock or other ownership interest, and no right to participate in the income, profits, or assets of the business. On the other hand, because Oliver purportedly promised to make the payments on Barbara's loan from Six Rivers, the amount Barbara deposited into IMC's account was arguably a loan to IMC, which would be repaid by IMC's (or Oliver's) payments on Barbara's loan. Where an individual has provided money to a company while relying on its skill, solvency, and success to repay it, the transaction may be deemed an investment contract and thus a security. (See *People v. Coster* (1984) 151 Cal.App.3d 1188, 1194 ["'When he is relatively uninformed and unskilled and then turns his money over to others, essentially depending upon their representations and their honesty and skill in managing it, the transaction is an investment contract."]; *People v. Simon* (1995) 9 Cal.4th 493, 497, fn. 4 [unsecured promissory note may constitute a security if the investor relied on the skill, services, solvency, success, and services of the issuer to ensure repayment].)

We need not decide whether Barbara's deposit into IMC's account constituted a security, however, because even if it did, Six Rivers did not *sell or offer to sell* this opportunity to Barbara and thus could not be liable under Corporations Code section 25401. The Olsons make much of evidence that Six Rivers knew how the loan proceeds would be used, but to no avail.[6] Although Six Rivers knew Barbara would invest the

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[6] For example, when asked at trial whether she understood that the purpose of the loan was for investing in IMC, McCarthy replied: "I understood that that was what

proceeds in IMC when it loaned her the money, such knowledge did not render it a *seller* of the investment. To the contrary, the loan proceeds were released without restriction, and there was no requirement that Barbara invest in IMC. Thus, there was substantial evidence that the Six Rivers loan transaction was distinct from the "investment" in IMC.

Nor do the Olsons provide any authority for the proposition that, by lending Barbara funds to invest in IMC, Six Rivers "*knowingly* provide[d] substantial assistance" to Oliver's violation of Corporations Code section 25401, thereby subjecting itself to liability under Corporations Code section 25403. The Olsons do not point to any evidence that Six Rivers *knew* Oliver had falsely told Barbara she would not have to repay the loan herself, or knew Oliver had misrepresented the nature of IMC's financial circumstances, or knew Oliver had otherwise misrepresented or omitted facts material to Barbara's "investment" in IMC. To the contrary, when McCarthy asked Barbara if Oliver had told her everything about the business, Barbara responded in the affirmative.

The Olsons have failed to establish that the promissory note was an illegal contract.[7]

B. RESCISSION (NINTH CAUSE OF ACTION; CONCEALMENT, FAILURE OF CONSIDERATION)

In their ninth cause of action, the Olsons alleged they were entitled to rescission based on theories of intentional misrepresentation, concealment, negligent misrepresentation, and failure of consideration. The court rejected each of these theories.

Barbara Olson intended to do with the money, yes." According to Brown, Barbara was told at the June 14 meeting that the money she was borrowing was going to be an investment in IMC. In addition, Brown's file memorandum asserted the loan request was "made to Barbara Olson personally for the purpose of investing into the Information Management Consultant company."

[7] We also note that a violation of Corporations Code section 25401 does not render the contract "illegal" as the Olsons assert, although in some circumstances it may entitle the aggrieved party to rescission. (Corp. Code, § 25501.) The parties do not address whether rescission would be appropriate under Corporations Code section 25501, but we need not consider the issue further.

On appeal, the Olsons claim the trial court should have granted rescission on the grounds of nondisclosure (concealment) and failure of consideration.[8]

1. Concealment

Concealment is "[t]he suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact." (Civ. Code, § 1710, subd. (3).)

On this issue, the trial court ruled as follows: "First, concealment of fact is not actionable fraud under Civil Code 1710(3) unless the defendant is under a duty to disclose. A lender is not its borrower's fiduciary nor does it stand in the special relationship of 'one who is bound to disclose.' [*Price v. Wells Fargo Bank* [(1989)] 213 [Cal.App.3d] 465, 476 [].] [¶] Second, while concealment may also be established when a disclosure of some facts about a transaction would be misleading without disclosing other material facts, what occurred at the June 14, 1996 meeting at the bank involved warning plaintiff Barbara Olson and confirming that she generally knew about IMC's financial condition. In this regard, the Court finds that defendant's Exhibit L, as a contemporary written memorialization of what occurred, to be the best evidence as to what occurred at that meeting. Lastly, even plaintiff Barbara Olson's contradicted version of what was said by Susan Diehl-McCarthy at that meeting only describes Susan Diehl-McCarthy's opinion of what could occur in the future with IMC, which is not a statement of fact."

The Olsons argue that Six Rivers owed a duty of disclosure because (1) IMC's indebtedness to Six Rivers made the bank a major stakeholder in IMC, and the bank therefore had a conflict of interest in the transaction that required it to disclose its

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8 The Olsons also make reference to the theory of mutual mistake. As they concede, this theory was not pled in their complaint. Moreover, it was not addressed in the statement of decision, and the Olsons did not object to its omission. The Olsons have waived any right to challenge the court's decision on the independent ground of mutual mistake.

involvement with IMC and IMC's precarious financial condition; and (2) the bank voluntarily assumed the role of Barbara Olson's investment advisor.

We will assume, arguendo, that Six Rivers had a conflict of interest giving rise to a duty to disclose. After all, the bank was not only a lender to Barbara, but also stood to receive a portion of the loan proceeds in partial satisfaction of IMC's outstanding indebtedness. Six Rivers knew that all of IMC's assets were pledged as collateral for Six Rivers loans, the liquidation value of IMC's assets was less than what IMC owed, and IMC was losing money in its business, thus suggesting that the loan to Barbara would result in a pay-down of IMC's indebtedness that Six Rivers would otherwise not obtain. In fact, out of the $25,000 Barbara borrowed from Six Rivers and deposited into IMC's account, over $7,000 was in turn used to pay down debt to Six Rivers. Banking expert Shaffer testified: "The fact that [Six Rivers] . . . loaned . . . Barbara Olson twenty-five thousand dollars at a point when they were unwilling and unable to lend additional moneys to the business and then have that money transferred into the business, in my opinion, represented evidence at least of a conflict of interest on the part of the bank."[9]

Assuming this conflict of interest created a duty of disclosure, substantial evidence nevertheless supports the conclusion that Six Rivers did not materially violate its disclosure obligations. As reflected in Brown's contemporaneous memorandum memorializing the transaction, the bank *did* disclose the weak financial condition of IMC: "We had a discussion about IMC in which Susan made very clear to Barbara Olson the weak financial condition of the IMC company. Ms. Olson reiterated that she understood the financial status of the company and was very aware that her investment was at risk, but it was a risk that she was wanting to take." Furthermore, although Six Rivers did not tell Barbara that funds deposited into IMC's account would be used to pay obligations to

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9 Six Rivers' intent is quite apparent from the following testimony offered by McCarthy: "As I recall, the discussions [at the bank before the June 14 loan] were that Six Rivers National Bank had provided financing for a good deal of I.M.C., Information Management Consultants Group, and it was no longer willing to lend money to the company, that the bank's position was that the owner of the company should put more money into the company or should find other investors into the company."

Six Rivers, there is no *evidence* such information was material to the transaction from Barbara's perspective. Barbara wanted to prop up IMC financially in order to get a job. In light of her purpose, there is no indication she would have decided not to borrow the money, merely because it was Six Rivers, rather than some other creditor, to whom IMC was indebted.[10]

2. Failure of Consideration

Next, the Olsons argue they were entitled to rescission under Civil Code section 1689, subdivisions (b)(3) and (4). Under these provisions, rescission is available if: "the consideration for the obligation of the rescinding party becomes entirely void from any cause" (Civ. Code, § 1689, subd. (b)(3)); or "the consideration for the obligation of the rescinding party, before it is rendered to him, fails in a material respect from any cause" (Civ. Code, § 1689, subd. (b)(4)).

The trial court rejected this argument, explaining that the Olsons "delivered their note to [Six Rivers] and, in consideration, were given the note proceeds to use as they determined." Substantial evidence supports this conclusion. Barbara received a cashier's check for $25,000, without restriction on its use. She therefore received the benefit of her bargain with Six Rivers.

Nevertheless, the Olsons argue that the consideration for Barbara's transaction with Six Rivers was not the $25,000 she received from the bank, but her subsequent "investment" in IMC, for which she received nothing. Arguing that "the loan transaction

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10 The Olsons also maintain that Six Rivers had a duty to disclose because it assumed common law fiduciary duties. As a general proposition, a lending institution does not have a fiduciary relationship to its borrower. (*Nymark v. Heart Fed. Savings & Loan Assn*. (1991) 231 Cal.App.3d 1089, 1093, fn. 1.) A bank's liability to a borrower for negligence arises only when the lender actively participates in the financed enterprise beyond the domain of the usual lender, as where it exhibits extensive control and shared profits. (*Wagner v. Benson* (1980) 101 Cal.App.3d 27, 35.) A mere lender of money "has no duty to disclose its knowledge that the borrower's intended use of the loan proceeds represents an unsafe investment. [Citation.] 'The success of the [borrower's] investment is not a benefit of the loan agreement which the [lender] is under a duty to protect [citation].'" (*Nymark*, *supra*, at p. 1096.)

and the investment in IMC were in every real sense a combined transaction" and "the two transactions are so inexorably linked that the failure of the investment in IMC is a failure of consideration defeating the loan," the Olsons contend the bank should be liable for the lack of consideration for her investment in IMC.

For the reasons already stated, the Olsons' argument that Six Rivers must be liable for her IMC investment is unpersuasive. The lack of any restriction on her use of the loan proceeds provides substantial evidence that the loan transaction between Barbara and Six Rivers was distinct from Barbara's purported "investment" in IMC. The Olsons fail to establish entitlement to rescission.[11]

C. CREDIT REPORTING ACT (FIRST & SECOND CAUSES OF ACTION)

As relevant here, the Credit Reporting Act limits the dissemination of consumer credit information. In their first and second causes of action, the Olsons claimed that Six Rivers improperly accessed Evan's credit file when evaluating Barbara's credit worthiness for the June 14 loan. We begin our analysis of the court's grant of summary judgment on these claims with a brief discussion of pertinent provisions of the Credit Reporting Act.

1. The Credit Reporting Act

Under Civil Code section 1785.3, subdivision (c), a "consumer credit report" is "any written, oral, or other communication of any information by a consumer credit reporting agency bearing on a consumer's credit worthiness, credit standing, or credit capacity, which is used or is expected to be used, or collected in whole or in part, for the purpose of serving as a factor in establishing the consumer's eligibility for: (1) credit to be used primarily for personal, family, or household purposes, or (2) employment purposes, or (3) hiring of a dwelling unit, as defined in subdivision (c) of Section 1940, or (4) other purposes authorized in Section 1785.11." The parties do not dispute that the joint credit report obtained by Six Rivers on the Olsons (including the information

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11 The Olsons also assert that IMC violated its own loan policy manual for "unacceptable loans." They give us no reason to conclude that the transaction should therefore be rescinded for *failure of consideration*.

corresponding to Evan in particular) constituted a credit report within the meaning of Civil Code section 1785.3.

Civil Code section 1785.11 limits the circumstances in which a consumer credit reporting agency may *furnish* a consumer credit report. As potentially relevant here, a consumer credit reporting agency could furnish Evan's credit information: pursuant to Evan's written instructions (Civ. Code, § 1785.11, subd. (a)(2)); or for use in connection with a credit transaction involving the extension of credit to the consumer—Evan or, as we shall see, Barbara (Civ. Code, § 1785.11, subd. (a)(3)(A)); or for the bank's legitimate need in connection with a business transaction "involving" Evan (Civ. Code, § 1785.11, subd. (a)(3)(F)). The report may be furnished pursuant to Civil Code section 1785.11, subdivision (a)(3)(A) "where it is a credit transaction that is not initiated by the consumer" if the "consumer authorizes the consumer credit reporting agency to furnish the consumer credit report to the person." (Civ. Code, § 1785.11, subd. (b)(1).)

A person (or bank) who *obtains* a consumer credit report for purposes other than those approved in Civil Code section 1785.11 may be held liable for damages or a civil penalty pursuant to Civil Code sections 1785.19 and 1785.31. The Olsons alleged that Six Rivers became liable under these provisions.

2. The Summary Judgment Motion

In its motion for summary judgment, Six Rivers asserted the following as undisputed material facts: (1) the trial court had already determined at trial that the loan was not illegal, Oliver was not Six Rivers' agent, and the bank had not committed intentional or negligent misrepresentation or concealed facts; (2) the personal financial statement submitted on Barbara's behalf was signed by Barbara and contained certain provisions; and (3) the bank obtained a joint credit report on the Olsons using the social security numbers written on the financial statement.

In ruling on the motion, the trial court relied on the personal financial statement executed by Barbara.[12] Towards the top of page one, the financial statement read: "If you live in a community property state your personal financial statement should include information about your spouse. If he or she is not a co-applicant for this loan, his or her separate property need not be included. Unless you indicate otherwise, Six Rivers National Bank will assume that all property listed is community property and that all debts listed for you or your spouse are community obligations." In the statement of her financial condition, numerous assets were identified as "JT" (joint tenancy) property. The financial statement also set forth employment information and income for both Barbara and Evan. Near Barbara's signature on the last page, the personal financial statement read in part: "I (we) *authorize* Six Rivers National Bank to verify or check any of the information given, check credit references, verify employment, and obtain *one or more credit reports in connection with this credit application* or in connection with any periodic review of any loans or credit which may be extended to me (us). *If I am married and live in a community property state, this authorization is also made on behalf of my spouse even if he or she is not a co-applicant*." (Italics added.)

In her declaration opposing the summary judgment motion, Barbara acknowledged that the signature on the financial statement was hers, but denied writing the other information on the statement, including the social security numbers. Barbara also asserted that Evan had not authorized her to consent to the release of his credit information. In his declaration, Evan averred that he never consented or authorized Barbara to consent to the accessing of his credit information.

The trial court granted summary judgment, relying on Civil Code section 1785.11, subdivision (a)(3)(F), which allows a credit report to be furnished where a party has a

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12 The sole evidentiary support for the bank's assertions of fact was the declaration of its attorney. The trial court sustained the Olsons' hearsay objection to those portions of the declaration corresponding to undisputed facts two and three, but noted that the personal financial statement was "already in evidence" from the trial (as defendant's exhibit A) and would be relied upon by the court.

legitimate need for the information in connection with a business transaction involving the consumer. The court explained: "Barbara Olson asked for a loan from the Bank and provided a signed financial information statement in connection with the loan. Although the loan was made in her name alone, the financial statement included information on Evan Olson. [] California is a community property state. As Barbara Olson acknowledges in her declaration, the Bank relied on her husband's credit worthiness for the loan. [] Following a lengthy court trial, the Court has already found that this loan transaction was valid and enforceable. [¶] The Bank had a legitimate business need for the credit information obtained on Barbara and Evan Olson in connection with the loan transaction. Spousal information in connection with a loan application by one spouse does not violate the Credit Reporting Act as long as it has a bearing on the applicant's credit worthiness. [Citations.] Neither the Federal or California Act make obtaining consumer credit information from a credit reporting agency unlawful when the information is needed in connection with a business transaction involving the consumer. Since this is a community property state, and wages and other joint assets were to be relied upon for credit worthiness, the Bank had a legitimate business need for Evan Olson's credit information in connection with the loan to Barbara Olson."

3. Analysis

In reviewing the grant of summary judgment, we conduct an independent review to determine whether there are triable issues of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *Buss v. Superior Court* (1997) 16 Cal.4th 35, 60; *Ochoa v. Pacific Gas & Electric Co*. (1998) 61 Cal.App.4th 1480, 1485.) We construe the moving party's evidence strictly, and the nonmoving party's evidence liberally, in determining whether there is a triable issue. (See *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 20.) A defendant seeking summary judgment must show that at least one element of the plaintiff's cause of action cannot be established, or that there is a complete defense to the cause of action. (Code Civ. Proc., § 437c, subd. (*o*)(2).) The burden then shifts to the plaintiff to show there is a

triable issue of material fact on that issue. (See Code Civ. Proc., § 437c, subd. (p)(2); *Jambazian v. Borden* (1994) 25 Cal.App.4th 836, 843-844.)

Based on the evidence provided by Six Rivers—namely, the signed personal financial statement itself—the bank established that its request for Evan's credit information was for a purpose authorized under Civil Code section 1785.11, subdivision (a). On its face, the financial statement set forth property the Olsons held jointly, and thus indicated that Barbara was relying on joint or community property in establishing her credit worthiness for the loan. As the trial court ruled, Six Rivers sought and obtained Evan's credit information out of a "legitimate business need for the information in connection with a business transaction involving the consumer"—in this case, Evan. (Civ. Code, § 1785.11, subd. (a)(3)(F).) The "business transaction"—the loan to Barbara based on the Olsons' *joint* property—"involved" Evan because it was predicated at least in part on Evan's credit worthiness. In fact, the community estate could be liable for the loan, even if only Barbara was party to it. (See Fam. Code, § 910.) Consequently, Six Rivers' request for Evan's credit information was authorized by Civil Code section 1785.11, subdivision (a)(3)(F).

A somewhat different approach, though also supporting the result reached by the trial court, has been applied under the federal counterpart of Civil Code section 1785.11, subdivision (a)(3)(A). Both the federal and state versions of this provision permit the furnishing of consumer credit information if the information is intended to be used in connection with a credit transaction "involving the consumer as to whom the information is to be furnished and involving the extension of credit to . . . the consumer." (*Ibid*.; 15 U.S.C. § 1681b(a)(3)(A).) Because the Credit Reporting Act is substantially based on the Federal Fair Credit Reporting Act (15 U.S.C. §§ 1681-1681t), judicial interpretation of the federal provisions is persuasive authority and entitled to substantial weight when interpreting the California provisions. (*Kahn v. Kahn* (1977) 68 Cal.App.3d 372, 387.)

In *Koropoulos v. Credit Bureau, Inc*. (D.C. Cir. 1984) 734 F.2d 37 (*Koropoulos*), a husband and wife sued a credit reporting agency for, among other things, providing adverse credit information of the husband to a credit card company considering a credit

card application of the wife. At issue was whether the furnishing of this credit information was permissible under title 15 United States Code section 1681b, in that the information was intended to be used in connection with a credit transaction involving the consumer on whom the information was to be furnished. The court stated: "The plain language of this provision seems to prohibit [the credit reporting agency] from sending a report on Mr. Koropoulos in response to a request for a report on Mrs. Koropoulos. The issue is somewhat complicated, however, by the Act's definition of a consumer report as [¶] 'any . . . communication bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used for . . . a purpose authorized under [15 U.S.C. § 1681b].' [¶] Thus, the Act seems to allow [the credit reporting agency] to communicate information about Mr. Koropoulos as long as it has a bearing on Mrs. Koropoulos' credit worthiness; such a communication would not violate the Act because it would constitute a consumer report on *Mrs.* Koropoulos." (*Koropoulos*, *supra*, at p. 46, italics added.)

Applying *Koropoulos* to the present matter, the language of Civil Code section 1785.11, subdivision (a)(3)(A), like its federal counterpart, might initially appear to prohibit obtaining a report on Evan in regard to a credit transaction involving only Barbara. As with title 15 of the United States Code section 1681b, however, the issue is complicated by the Credit Reporting Act's definition of a consumer credit report as a communication "*bearing on* a consumer's credit worthiness." (Civ. Code, § 1785.3, subd. (c), italics added.) Evan's credit history had a bearing on Barbara's credit worthiness, because Barbara relied on community assets to establish her credit worthiness. Evan's credit information therefore effectively constituted a consumer credit report on *Barbara*, who expressly authorized the credit report. The bank's request for his credit information was thus authorized under Civil Code section 1785.11, subdivision (a)(3)(A).

The Olsons fail to raise a triable issue of material fact. Although they point to evidence that Oliver filled in the social security numbers and other parts of the financial statement rather than Barbara, it is nevertheless undisputed that Barbara *signed* the financial statement, which authorized the credit report: "I (we) *authorize* Six Rivers

National Bank to verify or check any of the information given, check credit references, verify employment, and obtain *one or more credit reports in connection with this credit application* or in connection with any periodic review of any loans or credit which may be extended to me (us). *If I am married and live in a community property state, this authorization is also made on behalf of my spouse even if he or she is not a co-applicant*." (Italics added.)[13]

The Olsons advance a further claim: even if Barbara's consent permitted Six Rivers to access Evan's credit file, her consent became "void" when Oliver filled in the personal financial statement after Barbara signed it and before delivering it to Six Rivers. In this regard, the Olsons rely on *California Savings etc. Bank v. Wheeler* (1932) 216 Cal. 742 (*Wheeler*) and *Nissen v. Ehrenpfort* (1919) 42 Cal.App. 593 (*Nissen*). Neither *Wheeler* nor *Nissen* supports the Olsons' position.

Wheeler involved the alteration of a mortgage document to change the interest rate and the description of the covered property. Relying on Civil Code section 1700, the court ruled that a person who intentionally destroys or alters a written contract extinguishes all the contractual obligations in his favor. (*Wheeler*, *supra*, 216 Cal. at p. 746.) In the present case, however, the personal financial statement was not a contract between Barbara and the alterer, Oliver. And even if Civil Code section 1700 applied, Oliver's alteration of the document would only extinguish Olson's obligations *to Oliver*. Because the trial court found Oliver was not Six Rivers' agent, Oliver's acts cannot be attributed to Six Rivers. *Wheeler* is inapposite.

Nissen, involving the alteration of a negotiable instrument, is inapposite as well. There, the court ruled, a surety is exonerated of its obligations under Civil Code section 2819 upon the creditor's alteration of the instrument without the surety's consent.

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13 The Olsons contend that Barbara had neither actual nor ostensible authority to consent to the accessing of Evan's credit file. But the legality of the bank's request for Evan's credit information does not necessarily turn on whether Barbara had authority to consent to the release of *his* credit information, but on whether Six Rivers legitimately requested his credit information when evaluating her credit worthiness pursuant to Civil Code section 1785.11, subdivisions (a)(3)(A) or (F). For reasons discussed *ante*, it did.

(*Nissen*, *supra*, 42 Cal.App. at p. 595.) In the matter before us, however, Barbara was not a surety, and the personal financial statement was not a negotiable instrument. Thus, *Nissen* is not helpful to our analysis.

Nor is the Olsons' reliance on *Morris v. Credit Bureau of Cincinnati, Inc*. (S.D. Ohio 1983) 563 F.Supp. 962 helpful to their claim. In *Morris*, a defendant credit reporting agency learned it had erroneously attributed to plaintiff husband a bankruptcy of the plaintiff's wife, which occurred before their marriage. (*Id*. at pp. 964-965.) After the credit reporting agency learned of this error, it opened a new file on the plaintiff, which contained the same error. (*Id*. at p. 965.) The court found that the credit reporting agency had negligently failed to follow reasonable procedures to assure the maximum possible accuracy of the plaintiff's credit information. (*Id*. at p. 967.) Contrary to the Olsons' suggestion, the court did not predicate its decision on a determination that the wife's premarriage bankruptcy had no bearing on her husband's credit worthiness. (See *id*. at pp. 966-967.)

Lastly, the Olsons assert that Six Rivers' Ulrich testified in deposition that under proper banking procedures, when contemplating a loan to only one spouse, the bank should not access the credit file of the non-borrower spouse. Actually, Ulrich merely testified it was *the policy at Six Rivers* to request credit information on only the spouse who was requesting the credit; he did not opine as to the operation of the Credit Reporting Act. At any rate, the legal interpretation of the Credit Reporting Act in this case is not a matter for Ulrich, but a matter of law for the court.

The Olsons have failed to establish error in the court's grant of summary judgment.[14]

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14 The Olsons assert that, because the California Constitution provides a right of privacy, under California law "there is authority to believe that the literal language of [Civil Code] section[s] 1785.19 and 1785.11 cannot be read in the watered down fashion urged by defendant in its motion for summary judgment." We find this argument incomprehensible; at the very least, the Olsons have not established entitlement to a reversal on this ground.

III. DISPOSITION

The judgment is affirmed.

STEVENS, J.

We concur.

JONES, P.J.

SIMONS, J.

(A100172)

Trial Judge:	Hon. Marilyn B. Miles
Trial Court:	Humboldt County Superior Court
Counsel for Plaintiffs and Appellants:	Christopher G. Metzger, Ezra Eli Borntrager
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